IN THE

SUPREME COURT OF THE UNITED STATES

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

No. 82-5977

JAMES DOUGLAS HILL,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE
SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT's BRIEF IN OPPOSITION

The Respondent, the State of Florida, by and through the undersigned Assistant Attorney General, respectfully requests that this Court deny the petition for writ of certiorari.

OPINION BELOW

Petitioner seeks review of a decision of the Supreme Court of Florida imposing the death penalty. That opinion is reported at 422 So.2d 816 (Fla. 1982).

JURISDICTION

The jurisdiction of this Court is sought to be invoked by Petitioner under Section 1257(3), Title 28, United States Code. It is Respondent's position that the issues raised here are not such as should be reviewed by this Court. Review by writ of certiorari is a matter of sound judicial discretion, and

will be granted only where there are special and important reasons therefore. See Rule 19, Rules of the Supreme Court of the United States; Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed. 2d 341 (1974).

QUESTIONS PRESENTED

1. Whether the warrantless, electronic interception by state agents of a conversation between petitioner and a police informant in petitioner's backyard constitutes an unreasonable interception of petitioner's private communications in violation of the fourth amendment to the United States Constitution.

2. Whether the state court's application of a state statute, previously upheld by this court as constitutional, violates the Eighth and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution:

> "The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be siezed."

2. The Eighth Amendment to the United States Constitution:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

3. The Fourteenth Amendment to the United States Constitution:

> "SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. SECTION 921.141, Fla. Stat. (1979), set forth in the Appendix as A5 .

STATEMENT OF THE CASE

Respondent would rely on the facts as set forth in the Florida Supreme Court opinion reported as Hill v. State, 422 So.2d 816 (Fla. 1982).

On the afternoon of June 23, 1980, the victim (Rosa Lee Parker), young Tina and Tammy Deal, and Russell Jackson went skating. Afterwards, they returned to the Deals' home. Later in the evening, Rosa Lee asked Tammy Deal to accompany her to a nearby schoolyard to play, but Tammy's mother would not permit it. Rosa Lee then left alone, headed toward the school. This was the last time anyone saw Rosa Lee alive. On June 25, 1980, authorities retrieved her partially clad body from an area known as the "Pits" in Hillsborough County. The medical examiner determined the cause of death to be mechanical asphyxiation. The state charged petitioner with the first degree murder of Rosa Lee.

Russell Jackson testified at trial that on the same evening of Rosa Lee's death, petitioner asked him if he wanted to help rape the victim, and, if he did, petitioner would take her somewhere afterwards and "get rid of her." Another of petitioner's friends, Daniel Munson, testified that, early in the evening of the murder, petitioner came to his house on a motorcycle, accompanied by a female whom Munson could not identify. Munson would not let Hill enter his home, and petitioner and the female left. Munson further testified that Hill returned to his home about midnight that same evening, said that "he had the nerve to hurt someone," and took Munson to see Rosa Lee Parker's dead body. While viewing the body, petitioner boasted, "she wouldn't give it up, so I had to take it."

Munson related this information to police during an initial investigation. Pursuant to an agreement with authorities to drop pending charges, Munson went to petitioner's home wired with electronic surveillance equipment for the purpose of eliciting incriminating statements from petitioner. Munson persuaded Hill to accompany him into the backyard and there obtained statements in which petitioner admitting committing the murder. Munson testified at trial concerning those statements and the state introduced, over objection, both the police recording of the conversation and the testimony of the officers who overheard the conversation by way of the surveillance equipment.

Petitioner was charged by indictment filed July 9, 1980,

with first degree murder. (R 5) A motion to suppress evidence of the tape recorded conversation between petitioner and Munson was filed and denied on October 21, 1980. (R 12, 13)

At the conclusion of a jury trial held November 3 through November 6, 1980, petitioner was found guilty as charged. (R 26) He was sentenced to death in accordance with the jury's recommendation on November 7, 1980. (R 27, 31) The court found two aggravating factors, (1) that the murder was heinous, atrocious, and cruel, and (2) that it was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, and one mitigating factor, that petitioner had no significant criminal history. A motion for new trial was denied on October 21, 1980. (R 12, 13)

The Florida Supreme Court affirmed the lower court's judgment and sentence on July 15, 1982. Hill v. State, 422 So.2d 816 (Fla. 1982). The court also denied a subsequent motion for rehearing. (A 4)

REASONS WHY THE WRIT SHOULD BE DENIED

ISSUE I

THE WARRANTLESS, ELECTRONIC INTERCEPTION BY STATE AGENTS OF A CONVERSATION BETWEEN PETITIONER AND A POLICE INFORMANT IN PETITIONER'S BACKYARD DOES NOT CONSTITUTE AN UNREASONABLE INTERCEPTION OF PETITIONER'S PRIVATE COMMUNICATIONS IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The police informant in this case, Daniel Munson, is a friend of the petitioner. Munson, in exchange for resolution

of charges pending against him, agreed to work as an agent at the direction of law enforcement officers to provide evidence of petitioner's involvement in the murder of Rosa Lee Parker. Munson went to petitioner's home wired with electronic surveillance equipment. He persuaded Hill to accompany him into the backyard, and there obtained statements in which petitioner admitted committing the murder. Munson testified concerning these statements at trial and the state introduced, over objection, both the police recording of the conversation and the testimony of the officers who overheard the conversation by way of the surveillance equipment. Petitioner contends that the electronic interception of the conversation in his enclosed backyard violated his rights under the fourth amendment to the United States Constitution.

This Court has held that a defendant does not have a justifiable and constitutionally protected expectation that a person with whom he is conversing will not reveal the conversation to the police either then, by means of electronic equipment, or later. U. S. v. White, 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed 2d 453 (1970); Hoffa v. U.S., 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed. 2d 374 (1966).

White addressed the issue of whether the fourth amendment bars from evidence the testimony of govermental agents who related certain conversations which had taken place between White and an informant in the defendant's home and which the

officers had overheard by monitoring the frequency of a radio transmitter carried by the informant. In holding that this evidence should not be barred, the Court reiterated its holding in Hoffa that no matter how strongly a defendant trusts an apparent colleague, his expectations in this respect are not protected by the fourth amendment when it happens that his collegue is a government agent reporting regularly to the authorities.

More recently, in U.S. v. Coceres, 440 U.S. 741, 99 S.Ct. 1465, 59 L.Ed. 2d 733 (1979), the Supreme Court reaffirmed its position in White that no fourth amendment rights are violated by an undercover agent carrying radio equipment which transmitted the conversations with defendant to either recording equipment or to officers monitoring the transmitting frequency. The Court held that "[n]either the Constitution nor any Act of Congress requires that official approval be secured before conversations are overheard or recorded by Government agents with the consent of one of the conversants." [Footnote omitted.] 440 U.S. at 744, 99 S.Ct. at 1467.

In the present case, the monitoring of the conversation between petitioner and Munson was not a violation of the fourth amendment to the United States Constitution.

ISSUE II

THE STATE COURT'S APPLICATION OF A STATE STATUTE, PREVIOUSLY UPHELD BY THIS COURT AS CONSTITUTIONAL, DOES NOT VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Petitioner contends that the state court's application of the death penalty statute violated the Eighth and Fourteenth Amendments of the United States Constitution. In particular, petitioner claims that the trial court improperly doubled up aggravating circumstances, making the death penalty inappropriate.

The right to seek certiorari in the Supreme Court to review a state court judgment is a matter of sound judicial discretion and will be granted only where there is a substantial federal question presented which has previously been raised in the state courts and the state court judgment cannot be sustained on an independent ground of state law. Mr. Justice Brennan, "State Court Decisions and the Supreme Court", 31 Penn. Bar Assn. Q. 393, 399-400 (1960).

In Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed. 2d 913 (1976), this Court had an opportunity to review Florida's death penalty statute and held that the capital - sentencing procedures passed constitutional muster. Petitioner's claim that the state courts improperly applied state law does not present a substantial federal question.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted

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Theda James Davis

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Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished, by U.S. Mail to Barry Rosenstein, Attorney for Petitioner, 2431 Riverbluff Parkway, Sarasota, FL 33581, on this 31st day of January, 1983.

Theda James Davis
OF COUNSEL FOR RESPONDENT

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APPENDIX

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gating factors we set aside the sentence of death and remand to the trial court to make any additional findings it may deem appropriate and to reweigh the aggravating and mitigating circumstances.

Moody additionally points out that the trial court apparently thought that it did not have authority to order a presentence investigation report when it denied Moody's request that the court order one. This appears from the following statement in the record made by the court when it denied the request. The court said, "The motion for PSI is denied. There is no statutory authority for that, and this matter will proceed to sentencing at three thirty this afternoon." Although the trial court was not required by Florida Rule of Criminal Procedure 3.710 to order a presentence investigation before sentencing Moody, it had the discretion to order one. Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert. denied, 444 U.S. 919 (1979); Thompson v. State, 328 So.2d 1 (Fla. 1976). See also In re Florida Rules of Criminal Procedure, Rule 3.710, 362 So.2d 655 (Fla. 1978). On remand, the trial court should exercise its discretion and either grant or deny the request for a PSI.

Finally, we reject Moody's challenges to Florida's death penalty statute, all of which he concedes have already been expressly or impliedly rejected by this Court.

Accordingly, Moody's conviction is affirmed, and this cause is remanded for resentencing by the trial court without an additional jury recommendation.

It is so ordered. (Adkins, Boyd, Overton, and Sundberg, JJ., Concur. McDonald, J., Concurs in part and dissents in part: "I would remand with instructions to impose a life sentence."

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1. The court instructed:

You are further instructed that murder in the first degree is the unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of or in the attempt to perpetrate any of the following crimes: Arson, involuntary sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of 18 years when such drug is proven to be the proximate cause of the death of the user.

2. This rule has since been amended to permit collective questioning without consent. Florida Rule of Criminal Procedure 3.300(b), effective January 1, 1981, now provides:

Examination. The court may then examine each prospective juror individually or may examine the prospective jurors collectively. Counsel for both State and defendant shall have the right to examine jurors orally on their voir dire. The order in which the parties may examine each juror shall be determined by the court. The right of the parties to conduct an examination of each juror orally shall be preserved.

* * *

Criminal Law—Murder—Death Penalty—Evidence—Intercepted Communications—Tape Recording of Conversation Between Informant and Defendant Held in Defendant's Backyard Properly Admitted—Testimony of Officers Overhearing Conversation by way of Surveillance Equipment Properly Admitted—Eliciting of Defendant's Incriminating Statements by Party Acting Under Instruction of Police Not Violation of Right to Remain Silent Where Defendant not in Custody or Restricted in His Movements—Evidence of Premeditation Sufficient—Sentencing—No Improper Doubling of Aggravating Circumstances

JAMES DOUGLAS HILL, appellant, v. STATE OF FLORIDA, appellee. Supreme Court of Florida. Case No. 60,144. July 15, 1982. An appeal from the Circuit Court in and for Hillsborough County. Harry Lee Coe, III, Judge. Ronald W. Young, Tampa, Florida, for appellant. Jim Smith, Attorney General, and Michael A. Palecki, Assistant Attorney General, Tampa, for appellee.

(PER CURIAM.) This is a direct appeal from appellant's conviction of first-degree murder and, in accordance with the jury's recommendation, a sentence of death. See art. V, sec. 3(b)(1), Fla. Const. We affirm, holding that the dictates of Sarmiento v. State, 397 So.2d 643 (Fla. 1981), do not preclude the admission into evidence of appellant's confession made to an informant in appellant's backyard and recorded by police with electronic surveillance equipment.

The facts show that on June 25, 1980, authorities retrieved the dead body of twelve-year-old Rosa Lee Parker from an area known as the "Pits" in Hillsborough County. The body lay partially exposed in a shallow grave, covered with mud and hyacinths, and was clothed only in a brassiere pulled up over the breasts. The medical examiner determined the cause of death to be mechanical asphyxiation. The state charged twenty-two-year-old appellant with first-degree murder.

The testimony at trial revealed that on the afternoon of June 23, the victim, appellant, young Tina and Tammy Deal, and Russell Jackson went skating. Afterwards, they returned to the Deals' home. Later in the evening, Rosa Lee asked Tammy Deal to accompany her to a nearby schoolyard to play, but Tammy's mother would not permit it. Rosa Lee then left alone, headed toward the school. This was the last time anyone saw Rosa Lee alive.

Russell Jackson testified that on the same evening appellant asked him if he wanted to help rape Rosa Lee, and, if he did, appellant would take her somewhere afterwards and "get rid of her." Another of appellant's friends, Daniel Munson, testified that, early in the evening of the murder, appellant came to his house on his motorcycle, accompanied by a female whom Munson could not identify. Munson would not let appellant enter his home, and appellant and the female departed. Munson further testified that appellant returned to his home alone about midnight, said that "he had the nerve to hurt someone," and took Munson to see Rosa Lee Parker's dead body. While viewing the body, appellant boasted, "She wouldn't give it up, so I had to take it."

In the initial investigation, Munson related this information to the police. They persuaded him to go to appellant's home wired with electronic surveillance equipment for the purpose of eliciting incriminating statements from appellant. Munson agreed to do so after authorities promised to drop a pending burglary charge against him, drop pending parole violation charges, and not to charge him with accessory after the fact for the instant murder. Munson went to appellant's home, persuaded appellant to accompany him into the backyard, and there obtained statements in which appellant admitted committing the murder. Munson testified concerning those statements at trial and the state introduced, over objection, both the police recording of the conversation and the testimony of the officers who overheard the conversation by way of the surveillance equipment.

The jury recommended death and the trial judge imposed a death sentence. The court found two aggravating factors, (1) that the murder was heinous, atrocious, and cruel, and (2) that it was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, and one mitigating factor, that appellant had no significant

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to a violation of article I, section 12, but I will resist that temptation and restrict the application to the unreasonable interception.

In Odom we held the error harmless because the tape was merely cumulative. We can't say that the admission of the tape here was harmless. It played a significant role in the trial and was frequently discussed by witnesses and the prosecutor. Information gained from it was used in rebuttal.

This case should be remanded for a new trial.

II.

I also dissent from the imposition of the death penalty in this case. That sentence was predicated upon a finding that the crime was heinous, atrocious, and cruel and that the murder was committed in a cold, calculated, and premeditated fashion without any pretense of legal or moral justification. I disagree that either of these elements was proved beyond a reasonable doubt. I will concede that an inference of each exists, but aggravating factors must be proved beyond a reasonable doubt and that degree of proof is not met here. Since there is one mitigating factor and the proof of aggravation is insufficient, only a life sentence should be imposed should this conviction stand.

(Sundberg, J., Concurs as to part I only.)

* * *

Criminal Law—Robbery—Murder—Death Penalty—Statements Voluntarily Made by Defendant to Police Officers After Counsel had Been Retained Properly Admitted—Search and Seizure—Third-Party Consent to Search of Apartment Valid Where Party has Joint Access and Control of Entire Premises—No Error in Trial Court's Finding that Defendant Competent to Stand Trial or Jury Verdict Rejecting Defendant's Claim of Insanity at Time of Offense—Evidence—Testimony Placing Defendant at Scene of Separate Homicides Properly Admitted as Being Relevant to Identity—Defendant's Theory of Robbery not "Reasonable" so as to Negate Circumstantial Evidence—Argument—No Improper Comment on Defendant's Failure to Testify—Sentencing—Resentencing—Aggravating and Mitigating Circumstances—Person on Probation not "Person Under Sentence of Imprisonment"—Improper to Use Insanity Test as Standard in Determining Mitigating Circumstances Relating to Emotional Disturbance—Trial Court has no Jurisdiction to Consider Post Trial Motion Regarding Right to Have Execution Televised

JOHN ERROL FERGUSON, Appellant, v. STATE OF FLORIDA, Appellee. Supreme Court of Florida. Case No. 55,498. July 15, 1982. An appeal from the Circuit Court in and for Dade County. Richard S. Fuller, Judge. Michael S. Hacker of Hacker, Phelps and Matters, Miami, for appellant. Jim Smith, Attorney General, and Margarita Esquiroz, Assistant Attorney General, Miami, for appellee.

(ADKINS, J.) Appellant, John Errol Ferguson, was found guilty on two counts of first-degree murder, one count of involuntary sexual battery, one count of robbery, one count of attempted robbery, one count of unlawful possession of a firearm while engaged in a criminal offense, and one count of possession of a firearm by a convicted felon. He now appeals his convictions on the above and the resulting sentences of death and imprisonment. We have jurisdiction. Art. V, sec. 3(b)(1), Fla. Const.

Brian Glenfeld and Belinda Worley were last seen leaving a Youth for Christ meeting around 9:00 p.m. on Sunday, January 8, 1978. The two seventeen-year-olds were supposed to meet friends at an ice cream parlor. The next morning their bodies were discovered in a wooded area by two passersby.

Brian's body was behind the wheel of the car. He'd been shot in the chest and arm. A bullet to the head had killed him. Belinda's body was several hundred yards away in a dense growth. All she had on were her jeans; her other clothes were next to her body. She'd been shot in the back of the head. An autopsy indicated she'd been raped.

Brian's father testified that Belinda was wearing two rings, a gold bracelet and a pair of earrings when she and Brian left on Sunday evening. None of the jewelry was found with the bodies. Belinda's earlobe was torn where an earring had been taken. Brian's empty wallet was found in Belinda's purse near her body. His father had seen both the wallet and some cash in Brian's possession the previous evening.

On April 5, 1978, the defendant was arrested at his apartment pursuant to a warrant for unlawful flight to avoid prosecution; he was under indictment for another multiple-murder, the so-called Carol City murders. The defendant was read his Miranda rights each time he was questioned. He signed a consent to search form and allowed the officers to search the apartment. His roommate, Virginia Polk, also consented to the search. After the search, which produced probable evidence in another robbery, the defendant confessed to killing the "two kids." At the time of his arrest he had in his possession a .357 magnum capable of firing .38 caliber bullets like those which killed Brian and Belinda.

The gun was registered to Livingston Stocker, a victim of the Carol City murders. Margaret Wooden, a survivor of that incident, testified that the defendant had been in Stocker's Carol City house on July 27, 1977, the night he was murdered.

The defendant was convicted on two counts of first degree murder. The jury recommended the death penalty and the judge concurred in imposing the death sentence.

We reject the constitutional challenges to the death penalty. It is neither cruel and unusual punishment, Gregg v. Georgia, 428 U.S. 153 (1976), nor a violation of due process or equal protection. Proffitt v. Florida, 428 U.S. 242 (1976).

The trial court denied defendant's pre-trial motions to suppress statements made on April 5, 1978, the day of his arrest. Evidence at the suppression hearing showed that defendant was represented by counsel as of about 3:00 p.m. the day he was taken into custody. Defendant's attorney visited his client and claimed that he advised the officers involved that he didn't want anyone talking to his client unless he was present. This was contradicted by the state's evidence and the trial court found that such communication did not take place. The defendant was questioned at least twice after this and admitted the crimes without his attorney being present.

The trial judge in the case before us specifically found that the defendant knowingly and voluntarily waived his Fifth Amendment right. Witt v. State, 342 So.2d 497 (Fla.), cert. denied, 434 U.S. 935 (1977). The waiver is effective even though the defendant is represented by counsel and the officers are aware of that fact. United States v. Brown, 569 F.2d 236 (5th Cir. 1978); United States v. Vasquez, 476 F.2d 730 (5th Cir. 1973). The defendant in this case was questioned by three different officers investigating three separate incidents. Each time he was approached, the defendant was advised of his rights and clearly consented to talking without an attorney. When he finally did ask to

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Supreme Court of Florida

TUESDAY, OCTOBER 5, 1982

JAMES DOUGLAS HILL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 60,144

Circuit Court No. 80-5690
(Hillsborough)

Upon consideration of the Motion for Rehearing filed in the above cause by attorney for Appellant,

IT IS ORDERED that said Motion be and the same is hereby denied.

ALDERMAN, C.J., ADKINS, BOYD, OVERTON and EHRLICH, JJ., concur
McDONALD, J., dissents

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Clerk, Supreme Court

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cc: Hon. James T. Taylor, Jr., Cle
Hon. Harry Lee Coe, III, Judg

Ronald W. Young, Esquire
Michael A. Palecki, Esquire

CHAPTER 921

SENTENCE

921.09 Fees of physicians who determine sanity at time of sentence.
921.12 Fees of physicians when pregnancy is alleged as cause for not pronouncing sentence.
921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.
921.143 Appearance of victim to make statement at sentencing hearing; submission of written statement.
921.15 Stay of execution of sentence to fine; bond and proceedings.
921.16 When sentences to be concurrent and when consecutive.
921.161 Sentence not to run until imposed; credit for county jail time after sentence; certificate of sheriff.
921.18 Sentence for indeterminate period for noncapital felony.
921.185 Sentence; restitution a mitigation in certain crimes.
921.20 Classification summary; Parole and Probation Commission.
921.21 Progress reports to Parole and Probation Commission.
921.22 Determination of exact period of imprisonment by Parole and Probation Commission.
921.231 Presentence investigation reports.
921.241 Felony judgments; fingerprints required in record.

921.09 Fees of physicians who determine sanity at time of sentence.—The court shall allow reasonable fees to physicians appointed by the court to determine the mental condition of a defendant who has alleged insanity as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—s. 255, ch. 19554, 1939; CGL 1940 Supp. 8663(264); s. 121, ch. 70-339.

921.12 Fees of physicians when pregnancy is alleged as cause for not pronouncing sentence.—The court shall allow reasonable fees to the physicians appointed to examine a defendant who has alleged her pregnancy as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—s. 258, ch. 19554, 1939; CGL 1940 Supp. 8663(267); s. 122, ch. 70-339.

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present arguments for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose

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sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—s. 237a, ch. 19554, 1939; CGL 1940 Supp. 8663(246); s. 119, ch. 70-339; s. 1, ch. 72-72; s. 9, ch. 72-724; s. 1, ch. 74-379; s. 248, ch. 77-104; s. 1, ch. 77-174; s. 1, ch. 79-353.

Note.—Former s. 919.23.

921.143 Appearance of victim to make statement at sentencing hearing; submission of written statement.—

(1) At the sentencing hearing, and prior to the imposition of sentence upon any defendant who has pleaded guilty or nolo contendere to any crime, the sentencing court shall permit the victim of the crime for which the defendant is being sentenced to:

(a) Appear before the sentencing court for the purpose of making a statement under oath for the record; or

(b) Submit a written statement under oath to the office of the state attorney, which shall be filed with the sentencing court.

(2) The state attorney or any assistant state attorney shall advise all victims that statements, whether oral or written, shall relate solely to the facts of the case and the extent of any injuries, financial losses, and loss of earnings directly resulting from the crime for which the defendant is being sentenced.

(3) The court may refuse to accept a negotiated plea and order the defendant to stand trial.

History.—ss. 9, 10, ch. 76-274.

921.15 Stay of execution of sentence to fine; bond and proceedings.—

(1) When a defendant is sentenced to pay a fine, he shall have the right to give bail for payment of the fine and the costs of prosecution. The bond shall be executed by the defendant and two sureties approved by the sheriff or the officer charged with execution of the judgment.

(2) The bond shall be made payable in 90 days to the governor and his successors in office.

(3) If the bond is not paid at the expiration of 90 days, the sheriff or the officer charged with execution of the judgment shall indorse the default on the bond and file it with the clerk of the court in which the judgment was rendered. The clerk shall issue an execution as if there had been a judgment at law on the bond, and the same proceedings shall be followed as in other executions. After default of the bond, the convicted person may be proceeded against as if bond had not been given.

History.—s. 260a, ch. 19554, 1939; CGL 8426, 8427; CGL 1940 Supp. 8663(270); s. 123, ch. 70-339.

921.16 When sentences to be concurrent and when consecutive.—

(1) A defendant convicted of two or more offenses charged in the same indictment, information, or affidavit or in consolidated indictments, informations, or affidavits shall serve the sentences of imprisonment concurrently unless the court directs that two or more of the sentences be served consecutively. Sentences of imprisonment for offenses not charged in the same indictment, information, or affidavit shall be served consecutively unless the court directs that two or more of the sentences be served concurrently.

(2) A county court or circuit court of this state may direct that the sentence imposed by such court be served concurrently with a sentence imposed by a court of another state or of the United States. In

criminal history.

Trial Phase

Appellant raises three points dealing with the trial phase: (1) The tape recording and the officers' testimony of appellant's statements were obtained in violation of this Court's decision in State v. Sarmiento, 397 So.2d 643 (Fla. 1981); (2) because Munson was acting pursuant to police instructions, he was an arm of the police department, and the statements he obtained were a violation of Miranda v. Arizona, 384 U.S. 436 (1966); and (3) there was not sufficient evidence as a matter of law to prove premeditation.

Appellant first argues that the trial court committed reversible error in not suppressing the officers' testimony and the tape-recorded conversation between Munson and appellant. In State v. Sarmiento, we held that "the warrantless, electronic interception by state agents of a conversation between defendant and an undercover police officer in defendant's home [was] an unreasonable interception of defendant's private communications in violation of article I, section 12, Florida Constitution." 397 So.2d at 644. We based our decision on the principle that one enjoys a reasonable expectation of privacy in one's own home and that it is unreasonable to expect that others not privy to an in-home conversation will be listening in through electronic surveilling equipment. We concluded in Sarmiento that the tape recording and the testimony of officers listening to the surveilling devices were not admissible against the homeowner.

The instant case is, however, distinguishable from Sarmiento because the instant tape recording was of a conversation which occurred in appellant's backyard, not in the home. We refuse to extend the reasoning in Sarmiento and the protections of article I, section 12, beyond the four walls of the home. We note Odom v. State, 403 So.2d 936 (Fla. 1981), is also distinguishable from our holding in the instant case because that interception was in the home.

Because of mischaracterizations of our opinion in Sarmiento, we also feel that it is necessary to emphasize two points. First, Sarmiento does not prohibit an undercover officer or any other person who is privy to an in-home conversation from testifying about statements made therein. Second, the opinion does not prohibit the use of electronic surveilling devices by undercover officers in the home as long as a warrant has issued by the appropriate judicial officer.

Appellant's second contention is that, because Munson was acting under police instruction, appellant's statement made to Munson must be suppressed because the dictates of Miranda v. Arizona were not satisfied. This argument is without merit. Miranda only applies to instances of custodial interrogation; appellant was not in custody, nor was his freedom of movement restricted in any manner. See United States v. White, 401 U.S. 745 (1971); Hoffa v. United States, 385 U.S 293 (1966).

In a third point, appellant argues that there was insufficient evidence, as a matter of law, to prove premeditation. At appellant's trial, the state proved premeditation through the testimony of two witnesses. Russell Jackson testified that appellant asked him to come and help rape the victim and that, if he did, appellant would later "get rid of her." Munson testified that appellant told him why he raped and murdered the victim: "She wouldn't give it up so I had to take it." We are satisfied that the evidence presented at trial is sufficient to support appellant's guilt of first-degree premeditated murder beyond a reasonable doubt. Phippen v. State, 389 So.2d 991 (Fla. 1980); Spinkellink v. State, 313 So.2d 666 (Fla. 1975).

Sentencing Phase

Appellant contends that the trial court, in the penalty phase improperly doubled up aggravating circumstances, making the death penalty inappropriate. The trial court found two aggravating factors: The murder was heinous, atrocious, and cruel, and the murder was committed in a cold, calculated, and premeditated fashion without any pretense of legal or moral justification. Appellant asserts that the trial court based its findings as to both factors on the same evidence and did not distinguish the two. This, appellant claims, was improper. We find that, although the trial court considered both aggravating factors together, the trial court's findings contained distinct proof as to each factor. The record shows that appellant committed the rape and murder in such a fashion as to make it especially heinous, atrocious, and cruel. Further, the record shows that appellant's state of mind was such that he intended to rape and then murder the victim and that he made this decision substantially before the time that he picked her up. We conclude that this supports the finding that the murder was committed in a cold and calculated manner without pretense of moral or legal justification. The sentence of death was proper. See Buford v. State, 403 So.2d 943 (Fla. 1981); LeDuc v. State, 365 So.2d 149 (Fla. 1978), cert. denied, 444 U.S. 885 (1979); Hoy v. State, 353 So.2d 826 (Fla. 1977), cert. denied, 439 U.S. 920 (1978).

Accordingly, finding no reversible error, appellant's conviction and sentence of death are affirmed.

It is so ordered. (Alderman, C.J., Adkins, Boyd, Overton and Ehrlich, JJ., Concur. McDonald, J., Dissents with an opinion, in which Sundberg, J., Concurs as to part I only. Sundberg, J., Dissents.)

McDONALD, J., dissenting:

I.

It was reversible error to allow the introduction of the tapes of conversation between Munson and Hill. A comparable factual circumstance existed in Odom v. State, 403 So.2d 936 (Fla. 1981). There, one Gerald Jones, in cooperation with the police, wore a hidden transmitter and engaged Odom in a conversation in his home in which he made incriminating statements which the police recorded. We held that the admission of the tape into evidence was error under the constitutional rule excluding evidence obtained in violation of article I, section 12 of the Florida Constitution. When Munson agreed to elicit information from Hill in consideration for the state's dismissing charges against him, he became an agent of the state. He allowed a body bug to be planted on him and surreptitiously recorded the private conversation during which he caused Hill to discuss the homicide. This was an unreasonable interception of a private conversation and as such was proscribed by article I, section 12 of the Florida Constitution.

Had Hill been indicted at the time the conversations took place, all evidence of the conversation would be excluded because there would have been a sixth amendment violation. Massiah v. United States, 377 U.S. 201 (1964). See also United States v. Henry, 100 S.Ct. 1083 (1980). While that factor does not exist here, and we are not considering a sixth amendment violation, the language of Massiah and Henry suggests that courts should look with a critical eye at statements deliberately elicited by prosecutorial authority. See Malone v. State, 390 So.2d 338 (Fla. 1980). Because of that fact I would be inclined to raise the entire conversation

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